HSBC Bank Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–209 OF 2009
AZIAH ALI J
10 JANUARY 2011

Administrative Law — Remedies — Judicial review — Application for — Certiorari — Exercise of administrative powers — Decision of first respondent that Manager Band 4, 5 and 6 not employed in managerial, confidential or security capacity — Whether first respondent committed error of law or misdirected himself in law — Whether first respondent's decision merely administrative or procedural — Judicial review application made before any decision on recognition by first respondent — Whether application to quash decision premature — Industrial Relations Act 1967 s 9

Labour Law — Trade union — Recognition — Manager Band 4, 5 and 6 — Dispute as to whether employed in managerial, confidential or security capacity — Decision of first respondent — Whether first respondent committed error of law or misdirected himself in law — Director General of Industrial Relations failed to interview and/or failed to direct Industrial Relations Department in Kuala Lumpur to interview members of the applicant's Human Resources Department before making decision — Whether there was failure of natural justice

This was an application for judicial review for an order of certiorari to quash part of the decision of the first respondent made under s 9(5)of the Industrial Relations Act 1967 ('the Act'). The decision of the first respondent which the applicant sought to quash reads: 'Manager Band 4, Manager Band 5 and Manager Band 6 are employees that were not employed in the managerial, confidential or security capacity'. Essentially, the applicant contended that the first respondent had committed error of law by failing to consider that under Band 4, 5 and 6 there are employees who carry out either one of the function of managerial, confidential or security. The applicant submitted, inter alia, that the first respondent had failed to disclose in his affidavit an explanation as to how he had arrived at the conclusion that Manager Band 4, 5 and 6 are not employed in a managerial, confidential or security capacity. It was further contended that there was a failure of natural justice when the Director General of Industrial Relations ('DGIR') failed to interview and/or failed to direct the Industrial Relations Department in Kuala Lumpur to interview members of the applicant's Human Resources Department to obtain views and/or input before making the decision. The second respondent submitted that the first

respondent's decision which the applicant sought to quash was merely administrative or procedural and was not a decision on recognition under s 9(5) of the Act and therefore this application was premature.

Held, dismissing the application with costs:

(1) Based on the authorities of *Ketua Pengarah Kesatuan Sekerja, Malaysia v Evergreen Laurel Hotel (M) Sdn Bhd and another appeal* [2010] 4 MLJ 346 and *Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor (The Non-metallic mineral products manufacturing Employees Union, Intervener)* [1994] 4 CLJ 906, an application for judicial review made before any decision on recognition was made by the first respondent, was premature and merely served to fragment the decision-making process (see paras 18–19).

(2) The court agreed with counsel for the second respondent that this application was premature as the decision made by the first respondent which the applicant sought to quash was not a final decision on recognition under s 9(5) of the Act. For the same reason, it was not necessary to make any determination on the issues raised in relation to the actions undertaken by the DGTU and the DGIR (see para 20).

[Bahasa Malaysia summary

Ini adalah suatu permohonan bagi semakan kehakiman untuk mendapatkan suatu perintah certiorari bagi membatalkan keputusan responden pertama yang dibuat di bawah s 9(5) Akta Perhubungan Perusahaan 1967 ('Akta'). Keputusan responden pertama yang cuba dibatalkan oleh pemohon berbunyi 'Manager *Band* 4, Manager Band 5 and Manager Band 6 are employees that are not employed in the managerial, confidential or security capacity'. Pada dasarnya, pemohon menghujahkan bahawa responden pertama telah melakukan kesilapan undang-undang kerana gagal untuk mempertimbangkan bahawa di bawah *Band* 4, 5 dan 6 terdapat pekerja-pekerja yang menjalankan salah satu fungsi pengurusan, sulit atau keselamatan. Pemohon menghujahkan, antara lain, bahawa responden pertama telah gagal untuk mendedahkan dalam afidavitnya, satu penjelasan mengenai bagaimana dia telah menyimpulkan bahawa Pengurus *Band* 4, 5 dan 6 tidak bekerja dalam kapasiti pengurusan, sulit atau keselamatan. Seterusnya dihujahkan lagi bahawa terdapat kegagalan keadilan asasi apabila Ketua Pengarah Perhubungan Perusahaan ('KPPP') gagal untuk ditemuramah dan/atau gagal untuk mengarahkan Jabatan Perhubungan Perusahaan di Kuala Lumpur untuk menemubual anggota Jabatan Sumber Manusia pemohon untuk mendapatkan pandangan dan/atau input sebelum membuat keputusan. Responden kedua menghujahkan bahawa keputusan responden pertama yang cuba dibatalkan oleh pemohon adalah pentadbiran atau prosedur semata-mata

dan bukan keputusan yang diiktiraf di bawah s 9(5) Akta dan dengan itu, permohonan ini adalah pra-matang.

Diputuskan, menolak permohonan dengan kos:

(1) Berdasarkan kepada pihak berkuasa *Ketua Pengarah Kesatuan Sekerja, Malaysia v Evergreen Laurel Hotel (M) Sdn Bhd and another appeal* [2010] 4 MLJ 346 dan *Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor (The Non-metallic mineral products manufacturing Employees Union, Intervener)* [1994] 4 CLJ 906, suatu permohonan untuk semakan kehakiman yang dibuat sebelum apa-apa keputusan mengenai pengiktirafan telah dibuat oleh responden pertama, adalah pra-matang dan hanya menyumbang sebahagian kepada proses membuat keputusan (lihat perenggan 18–19).

(2) Mahkamah bersetuju dengan peguam yang mewakili responden kedua bahawa permohonan ini adalah terlalu awal kerana keputusan yang dibuat oleh responden pertama yang cuba dibatalkan oleh pemohon bukanlah keputusan muktamad terhadap pengiktirafan di bawah s 9(5) Akta. Bagi alasan yang sama, adalah tidak perlu untuk membuat apa-apa penentuan mengenai isu-isu yang dibangkitkan berhubung dengan tindakan-tindakan yang diambil oleh KPPP dan KPHDN (lihat perenggan 20).]

Notes

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 781–787.

Cases referred to

Joseph Puspam v Menteri Sumber Manusia, Malaysia & Anor [2001] 4 CLJ 252, CA (refd)

Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors [2005] 7 MLJ 132, HC (refd)

Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Anor [2005] 5 MLJ 193, HC (refd)

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Union & Anor [1990] 3 MLJ 231, HC (refd)

Ketua Pengarah Kesatuan Sekerja, Malaysia v Evergreen Laurel Hotel (M) Sdn Bhd and another appeal [2010] 4 MLJ 346; [2010] 8 CLJ 413; [2010] 1 LNS 362 (folld)

Menteri Sumber Manusia v Association of Bank Officers [1999] 2 MLJ 337, FC (refd)

Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal [1997] 3 MLJ 377, HC (refd)

Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor (The Non-metallic Mineral Products Manufacturing Employees Union, Intervener) [1994] 4 CLJ 906, HC (folld)

Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 3 MLJ 437; [2009] 5 CLJ 153; [2009] 1 LNS 178, CA (refd)

Legislation referred to

Industrial Relations Act 1967 s 9, 9(1), (1A), (4B), (4B)(b), (5)
Rules of the High Court 1980 O 53 r 6
Trade Unions Act 1959

N Sivabal (Raymond TC Low with him) (Shearn Delamore & Co) for the applicant.

Nik Mohd Noor bin Nik Kar (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.

Ramesh NP Chandran (Ravindran Pillai with him) (Renuka Rabindranath & Associates) for the second respondent.

Aziah Ali J:

[1] This is an application for judicial review for an order of certiorari to quash part of the decision of the first respondent, the Minister of Human Resources, Malaysia made under s 9(5) of the Industrial Relations Act 1967 ('the Act'). The decision of the first respondent which the applicant seeks to quash reads 'Manager Band 4, Manager Band 5 and Manager Band 6 are employees that are not employed in the managerial, confidential or security capacity' (exh LKW20). Essentially the applicant contends that the first respondent has committed error of law by failing to consider that under Band 4, 5 and 6 there are employees who carry out either one of the function of managerial, confidential or security.

BACKGROUND

[2] The second respondent 'Persatuan Pengurus-Pengurus Residen HSBC Bank Malaysia Berhad' is an in-house Trade Union of Employees established and registered under the Trade Union Act 1959 ('the Union'). The Union was registered to represent the resident managers of the applicant. The Constitution of the Union does not permit the Union to represent employees who are engaged in the managerial, confidential and security capacities.

[3] By a letter dated 13 February 2006 the Union had submitted a 'claim for recognition' under s 9 of the Act. The applicant refused to grant the recognition sought by the Union but instead referred the matter to the Director General of

Industrial Relations ('DGIR') requesting the DGIR to determine:

(a) whether or not the Union is a competent union to represent all resident managers; and

(b) whether or not the intended scope of representation of the Union with reference to Form A and r 3 of the Union's Constitution satisfies the requirements of s 9(1) of the Act.

The letter further states that in the event the Union is ruled to be competent to represent the resident managers within the intended scope of representation a secret ballot be carried out to determine if the Union has obtained a majority of members.

[4] The DGIR then issued a letter to the Director General of Trade Union ('DGTU') and requested the DGTU to decide on the issue of competency of the Union to represent the employees of the applicant under s 9(4B)(b) of the Act. The DGIR also wrote a letter dated 18 August 2006 to the Industrial Relations Department in Kuala Lumpur ('IRD KL') to inform them that the applicant had raised an issue on the scope of membership of the Union under s 9(1A) of the Act. The assistance of the IRD KL was sought to conduct interviews with the relevant resident managers to ascertain the matter.

[5] Pursuant to the request by the DGIR, the DGTU informed the applicant that the DGTU proposed to conduct an on-site visit to the applicant's premises to investigate on the naiure of business and the responsibilities of the resident managers of the applicant to decide the competency of the Union to represent the resident managers of the applicant. Pursuant to the on-site visit, the DGTU reported its findings to the DGIR.

[6] On 18 December 2007 the DGIR issued a letter to the applicant and to the Union wherein the DGIR confirmed the findings of the DGTU and stated that the Union is competent to represent 'employees of the Applicant' instead of 'Resident Managers of the Applicant'. The DGIR upon realising the error in its letter issued another letter dated 28 January 2008 to the applicant and the Union highlighting the error and withdrew the letter of 18 December 2007. The DGIR issued another letter with the mistake corrected. The applicant filed two judicial review applications to quash the decision of the DGIR. The applications were dismissed.

[7] The IRD KL conducted interviews with 142 resident managers of the applicant and notified its findings to the first respondent. Thereafter the first respondent issued the letter dated 4 May 2009 under s 9(5) of the Act part of which states that Managers Band 4, 5 and 6 are employees not employed in managerial, confidential or security capacities. The applicant 'now seeks to

quash this part of the decision.

SUBMISSIONS

[8] Learned counsel for the applicant submits that there is a material error of law when the first respondent failed to appreciate that under job grades of Manager Band 4, Manager Band 5 and Manager Band 6 as at 13 February 2006, there are approximately 347 positions and titles held by employees of the applicant whose job functions and responsibilities of the positions reflect that such employees carry out either managerial and/or confidential and/or security functions, in substance and in effect. Therefore these employees do not fall within the scope of representation of the Union for the purpose of the recognition claim.

[9] It is further submitted that the first respondent has erred in law by asking himself the wrong questions and/or has applied the wrong test. It is submitted that the correct test and approach was to examine the job titles of each category of employees instead of the job grade of employees as the job grade does not connote the title or nature of work being carried out by the employees. Job grade is merely a label used to indicate the scale of pay and benefits that the employees are eligible for. It is submitted that had the first respondent properly examined the title and job description of each position, he would have come to the conclusion that there are employees who are employed either in the managerial, confidential or security capacities. Counsel submits that nowhere has the first respondent aver that either he or the officers of the DGTU or the DGIR had actually considered, examined or even taken into account the job description of the affected employees. It is submitted that the list exh LKW21 will show that many of the positions and posts are confidential and security positions irrespective of rank. Such categories of employees are outside the purview of the scope of the representation of the second respondent.

[10] Counsel submits that the first respondent has failed to disclose in his affidavit an explanation as to how he had arrived at the conclusion that Manager Band 4, 5 and 6 are not employed in managerial, confidential or security capacity. At paras 21 and 22 of his affidavit the first respondent explained that he merely relied on the investigations carried out by the DGIR and DGTU but no report of such investigation was disclosed and the DGIR and DGTU have not affirmed any affidavit to explain their investigation processes or results. From the records only the Industrial Relations Department Kuala Lumpur has carried out the interview sessions with the applicant's employees and had not sought the views of the DGTU (s 9(4B) of the Act). The DGTU was not involved although one of the statutory roles of the DGTU is to determine the competency of a trade union to represent particular group of employees in an establishment. It is submitted that it was incumbent on the

DGIR and the first respondent to seek the views of the DGTU before making the decision. By failing to avail himself of the views of the DGTU, counsel submits that the first respondent has committed an error of law (*Menteri Sumber Manusia v Association of Bank Officers* [1999] 2 MLJ 337).

[11] Counsel further submits that the first respondent has failed to justify and/or provide any rational or reasonable basis for his decision. In the absence of any explanation or sufficient reasons the court can conclude that the first respondent has no good reason to offer and his decision can be interfered with on ground of *Wednesbury* unreasonableness (*Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Anor* [2005] 5 MLJ 193; *Menteri Sumber Manusia v Association of Bank Officers* [1999] 2 MLJ 337). It is submitted that absence of grounds or the basis for reaching the conclusion without more renders the decision a nullity.

[12] It is further contended that there was a failure of natural justice when the DGIR failed to consult the applicant on the job scope of the employees and instead merely interviewed the selected employees. Counsel submits that the DGIR failed to interview and/or failed to direct the IRD KL to interview members of the applicant's Human Resources Department to obtain views and/or input before making the decision. It is submitted that in carrying out duties under the Trade Unions Act 1959 the DGTU is bound to observe the rules of natural justice (*Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Union & Anor* [1990] 3 MLJ 231).

[13] For the first respondent learned senior federal counsel submits that the DGTU had conducted an investigation and, based on the investigation conducted by the DGTU, the first respondent was satisfied that Managers Band 4, 5 and 6 are not employed in managerial, confidential or security capacities. Learned senior federal counsel refers to the affidavit of the first respondent where at paras 21 and 22 of encl 13 the first respondent avers that the decision was made based on facts obtained from the investigation and interviews conducted by the DGIR and the DGTU. In para 22 the first respondent avers that based on the result of the investigation carried out by the DGIR on the capacities of the employees in Band 4, 5 and 6 he was satisfied that they were not involved in the managerial, confidential or security capacity.

[14] It is further submitted that s 9 of the Act imposes no obligation on the first respondent to provide reasons for his decision when there is no duty to provide one, and the absence of reasons is no ground to support any suggestion that the decision is irrational (*Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal* [1997] 3 MLJ 377; *Joseph Puspam v Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252). It is further submitted that the first respondent has

considered the outcome of the investigation and the interviews conducted the DGTU which was forwarded to the DGIR who then notified the first respondent. There is no duty imposed on the first respondent to disclose particulars of the investigation and if at all the applicant wishes to obtain such particulars the procedure is provided for under O 53 r 6 for discovery.

[15] For the second respondent learned counsel raised the issue of prematurity of the application for judicial review. Counsel submits that the first respondent's decision which the applicant seeks to quash is merely administrative or procedural and is not a decision on recognition under s 9(5) of the Act and therefore this application is premature. It is submitted that only a decision on recognition under s 9(5) is amenable to judicial review (*Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* [2005] 7 MLJ 132). Learned senior federal counsel agrees that the decision made by the first respondent is on the issue of capacity and not recognition.

[16] In response counsel for the applicant submits that the present application is to challenge the decision of the first respondent regarding the issue of capacity. Counsel submits that s 9(5) of the Act empowers the first respondent to make two decisions ie in respect of capacity and in respect of recognition. Counsel submits that the first respondent's decision on capacity will have a direct bearing on the process for recognition since if these employees are not excluded, then ineligible employees would be considered for membership.

DECISION

[17] Counsel for the applicant concedes that the decision that the applicant seeks to quash is on the issue of competency and not on recognition but submits that the issue of competency has a bearing on the consequential issue of recognition. Having considered the submissions, I am of the view that there is merit in the submissions by counsel for the second respondent on the issue of prematurity.

WHETHER THE APPLICATION IS PREMATURE

[18] I refer to the Court of Appeal case of *Ketua Pengarah Kesatuan Sekerja, Malaysia v Evergreen Laurel Hotel (M) Sdn Bhd and another appeal* [2010] 4 MLJ 346; [2010] 8 CLJ 413; [2010] 1 LNS 362 which was an appeal against the decision of the learned judicial commissioner who had, pursuant to the application of Evergreen Laurel Hotel (M) Sdn Bhd ('the hotel'), granted an order of certiorari to quash the DGTU's decision that the membership check be done by the 'verification method'; and an order of mandamus directing the DGTU to use the 'secret ballot' instead. In his judgment Low Hop Bing JCA

A referred to the case of *Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* which counsel for the second respondent herein cited in support of his submissions that the present application is premature. In his judgment Low Hop Bing JCA said as follows:

B > In our view, s 9 comprehensively deals with the 'Recognition and Scope of Representation of Trade Unions'. It is pertinent to point out that s 9(1) to (4C) prescribe the procedure, process and practice (collectively, 'the procedure') to be adopted by the DGIR and the DGTU in considering a trade union's application for recognition. However, the power to accord recognition can only be made by the Minister under s 9(5). Our view is reinforced by a number of judicial pronouncements on the procedure established under s 9.
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> Our courts have made it abundantly clear that the decision as to whether to accord recognition lies singularly with the Minister under s 9(5). The act of the DGTU on membership check, being part of the procedure for recognition, is only an administrative act towards the final decision of the Minister under s 9(5).
>
> The'DGTU's act is merely part and parcel of the procedure for recognition. That being the position, the DGTU's act is not subject to judicial review. Only the Minister's decision is judicially reviewable.
>
> The hotel's application filed in the High Court before a decision was made by the Minister under s 9(5) is clearly against the intent and spirit of the Industrial Relations Act 1967; and hence against public policy. The hotel ought to have proceeded under s 9(5) and waited for the Minister to make a decision thereon. It is only thereafter that the hotel may seek judicial review under O 53: see *Kaneka Paste Polymers Sdn Bhd v Ketua Pengarah Perhubungan Perusahaan & 2 Ors* [2005] 1 LNS 276.
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> In the circumstances, we hold that the hotel's application before the High Court was premature.

The Court of Appeal affirmed the judgment of Siti Norma Yaakob J (later CJ (Malaya) in *Syarikat Emerald Tiles Sdn Bhd v Merited Buruh dan Tenaga Rakyat & Anor (The Non-metallic Mineral Products Manufacturing Employees Union, Intervener)* [1994] 4 CLJ 906 (HC), wherein Her Ladyship held that when the DGTU was conducting the membership check, he was merely performing an administrative act and that when the recognition issue could not be resolved, that issue was referred to the Minister for decision on whether to award recognition under s 9(5). It was only after the Minister's decision that the applicant could seek to quash it by certiorari.

[19] Based on the abovementioned authorities an application for judicial review made before any decision on recognition is made by the first respondent is premature and merely serves to fragment the decision-making process. In the case of *Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 3 MLJ 437; [2009] 5 CLJ 153; [2009] 1 LNS 178, Suriyadi Halim Omar JCA said in his judgment as follows:

> … this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision making process and hence premature. We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings. The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration.
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> … the dispute between the parties before us relate to a claim of recognition, with the first respondent's decision merely detprmining the question of the Union's competence to represent the appellant's employees. Section 9 of the Act clearly specifies that the power to accord recognition rest on the Minister.

[20] I agree with counsel for the second respondent that this application is premature as the decision made by the first respondent which the applicant seeks to quash is not a final decision on recognition under s 9(5) of the Act. For the same reason I am of the view that it is not necessary to make any determination on the issues raised in relation to the actions undertaken by the DGTU and the DGIR. For the reasons stated the application is dismissed with costs of RM5,000 to each respondent.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed